

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

INDUSTRIAL EXCESS LANDFILL,
INC.; B.F. GOODRICH COMPANY;
BRIDGESTONE/FIRESTONE, INC.;
HYMAN BUDOFF; GENCORP, INC.;
GOODYEAR AEROSPACE
CORPORATION; GOODYEAR TIRE
AND RUBBER COMPANY; HYBUD
EQUIPMENT CORPORATION
CHARLES KITTINGER; MERLE
KITTINGER; KITTINGER TRUCKING
COMPANY; MORGAN ADHESIVES
COMPANY; PPG INDUSTRIES, INC.,

Defendants.

CASE NOS.

5:89 CV 1988

5:91 CV 2559

JUDGE PETER C. ECONOMUS

STATE OF OHIO, ex rel. JIM PETRO,
ATTORNEY GENERAL OF OHIO,

Plaintiff,

v.

INDUSTRIAL EXCESS LANDFILL,
INC., et al.,

Defendants.

PARTIAL CONSENT DECREE

**Ability-to-Pay Consent Decree Between
Plaintiffs, United States of America and State of Ohio,
and Defendants Charles Kittinger, Merle Kittinger, and Kittinger Trucking Co.**

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I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9607, and an amended complaint pursuant to Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, seeking recovery of costs incurred and to be incurred in responding to the release or threat of release of hazardous substances at or in connection with the Industrial Excess Landfill Superfund Site in Uniontown, Stark County, Ohio ("Site"), and penalties and punitive damages against those defendants that failed to comply with an order issued by EPA under Section 106 of CERCLA.

B. The State of Ohio ("State"), on behalf of the Director of the Ohio Environmental Protection Agency, has also filed a complaint in this matter pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, and Ohio Revised Code ("R.C.") 3745.12, R.C. Chapter 3734, R.C. Chapter 6111, R.C. Chapter 3767, and common law nuisance and common law ultrahazardous activity, for, *inter alia*, reimbursement of costs incurred by Ohio in responding to contamination at the Site, injunctive relief, and civil penalties.

C. As a result of the release or threatened release of hazardous substances, EPA and the State have undertaken response actions at or in connection with the Site under Section 104 of CERCLA, 42 U.S.C. § 9604, and will undertake response actions in the future. In performing these response actions, EPA and the State have incurred and will continue to incur response costs at or in connection with the Site. Response actions undertaken at the Site to date by EPA, the State, and other persons include: a remedial investigation and feasibility study; installation and operation of a gas venting system; extension of a municipal water supply to nearby residents;

installation of groundwater monitoring wells; periodic groundwater sampling and analysis; a focused feasibility study; and enhancement of vegetative cover over the landfill. On April 7, 2005, a consent decree was entered under which five defendants agreed to implement the final remedy for the Site and to pay \$17,925,000 of the United States' past response costs, \$875,000 of the State's past response costs, and certain defined interim and future costs incurred or to be incurred by the United States or the State. On October 2, 2007, two *de minimis* contributor consent decrees were entered, which required Defendant PPG Industries, Inc. to pay \$752,500 to the United States and Defendant Morgan Adhesives Co. to pay \$334,106 to the United States and \$15,984 to the State of Ohio, all in partial reimbursement of past response costs.

D. Charles Kittinger and Merle Kittinger and Kittinger Trucking Company, the Defendants who have entered into this Consent Decree ("Settling Defendants") do not admit any liability to Plaintiffs arising out of the transactions or occurrences alleged in the amended complaint.

E. The United States has reviewed the Financial Information submitted by Settling Defendants to determine whether Settling Defendants are financially able to pay response costs incurred and to be incurred at the Site. Based upon this Financial Information, the United States has determined that Settling Defendants are able to pay no more than the amounts specified in Section VI.

F. The United States, the State, and Settling Defendants agree that settlement without further litigation and without the admission or adjudication of any issue of fact or law is the most appropriate means of resolving this action with respect to Settling Defendants.

THEREFORE, with the consent of the Parties to this Consent Decree, it is ORDERED, ADJUDGED, and DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. § 9613(b), and also has personal jurisdiction over Settling Defendants. Settling Defendants consent to and shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States, upon the State, and upon Settling Defendants and their successors, assigns and estates. Any change in ownership or corporate or other legal status of any Settling Defendant, including but not limited to, any transfer of assets or real or personal property shall in no way alter such Settling Defendant's responsibilities under this Consent Decree.

IV. STATEMENT OF PURPOSE

3. By entering into this Consent Decree, the mutual objectives of the Parties are:

- a. to reach a final settlement among the Parties with respect to the Site pursuant to Section 122(g) of CERCLA, 42 U.S.C. § 9622(g), that allows Settling Defendants to make a cash payment to the United States and a cash payment to the State, based upon their ability to pay, to resolve their alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, R.C. 3745.12, R.C. Chapter 3734, R.C. Chapter 6111, R.C. Chapter 3767, and common law nuisance and common law ultrahazardous activity, for injunctive relief with regard to the Site and for response costs incurred and to be incurred at or in connection with the Site,

thereby reducing litigation relating to the Site;

b. to simplify any remaining administrative and judicial enforcement activities concerning the Site by eliminating three potentially responsible parties from further involvement at the Site; and

c. based on the settlement, to provide for full and complete contribution protection for Settling Defendants with regard to the Site pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5).

V. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in the statute or regulations. Whenever the terms listed below are used in this Consent Decree, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

b. "Consent Decree" or "Decree" shall mean this Consent Decree and all appendices attached hereto. In the event of conflict between this Consent Decree and any appendix, the Consent Decree shall control.

c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities.

e. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

f. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

g. "Ohio EPA" shall mean the Ohio Environmental Protection Agency and any successor departments or agencies of the State.

h. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

i. "Parties" shall mean the United States, the State, and the Settling Defendants.

j. "Plaintiffs" shall mean the United States and the State.

k. "Response costs" shall mean all costs of "response" as that term is defined by Section 101(25) of CERCLA, 42 U.S.C. § 9601(25).

l. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

m. "Settling Defendants" shall mean Charles Kittinger, Merle Kittinger, and Kittinger Trucking Company.

n. "Site" shall mean the Industrial Excess Landfill Superfund Site, encompassing approximately 30 acres, located at 12646 Cleveland Avenue in Uniontown, Stark County, Ohio and generally shown on the map attached as Appendix A.

o. "State" shall mean the State of Ohio, including all of its departments, agencies, and instrumentalities, which includes without limitation Ohio EPA, the Ohio Army National Guard, the Ohio Department of Natural Resources, Ohio State Parks and Recreation, and any state natural resources trustee.

p. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

VI. PAYMENT

5. Within thirty (30) days after entry of this Consent Decree, Settling Defendants shall pay to the EPA Hazardous Substance Superfund \$954.

6. Settling Defendants shall be jointly and severally liable for the payment under Paragraph 5.

7. Payment shall be made by certified or cashier's check made payable to "U.S. Department of Justice," referencing USAO File Number 1987V23778, EPA Site/Spill ID Number 05-W2, and DOJ Case Number 90-11-3-247/2. Settling Defendants shall send the check to:

Financial Litigation Unit
United States Attorney's Office
for the Northern District of Ohio
United States Courthouse
801 W. Superior Ave.
Suite 400
Cleveland, OH 44113

8. Within thirty (30) days after entry of this Consent Decree, Settling Defendants shall pay to the State \$46 in the form of certified or cashier's check made payable to "Treasurer, State

of Ohio.” The payment shall be sent to Martha Sexton, Paralegal, or her successor at the Office of the Attorney General of Ohio, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215-3400 to be deposited into the Ohio EPA Hazardous Waste Special Cleanup Account. Settling Defendants shall be jointly and severally liable for the payments under this Paragraph.

9. At the time of payment under Paragraphs 5 and 8, Settling Defendants shall send notice that such payment has been made to:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Washington, D.C. 20044-7611
Re: DJ #90-11-3-247/2

Timothy Thurlow
Office of Regional Counsel
United States Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, IL 60604

Chief, Finance
United States Environmental Protection Agency
Region 5, MF-10J
77 West Jackson Boulevard
Chicago, IL 60604-3590

Senior Deputy, Environmental Enforcement Section
Ohio Attorney General's Office
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3400
Re: IEL Site

and

Larry Antonelli
Ohio EPA Project Coordinator
DERR/OEPA
Northeast District Office
2110 East Aurora Road
Twinsburg, Ohio 44087

VII. FAILURE TO MAKE PAYMENT

10. If Settling Defendants fail to make full payment within the time required by Paragraph 5 or Paragraph 8, Settling Defendants shall pay Interest on the unpaid balance. In addition, if Settling Defendants fail to make full payment as required by Paragraph 5 or Paragraph 8, the United States or the State (as appropriate) may, in addition to any other available remedies or sanctions, bring an action against Settling Defendants seeking injunctive relief to compel payment and/or seeking civil penalties under Section 122(I) of CERCLA, 42 U.S.C. 9622(I), for failure to make timely payment.

VIII. CERTIFICATION OF SETTLING DEFENDANTS

11. By signing this Consent Decree, each Settling Defendant certifies that, to the best of its knowledge and belief, it:

a. has conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA, all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, which relates in any way to the ownership, operation, or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant, or contaminant at or in connection with the Site;

b. has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site after notification of potential liability or the filing of a suit against it regarding the Site; and

c. has complied and will comply fully with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e).

IX. COVENANT NOT TO SUE BY PLAINTIFFS

12. In consideration of the payment that will be made by Settling Defendants under Paragraph 5 of this Consent Decree, and except as specifically provided in Section X (Reservations of Rights by Plaintiffs), the United States covenants not to sue or take administrative action against Settling Defendants pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607, relating to the Site. With respect to present and future liability, this covenant not to sue shall take effect upon receipt of Settling Defendants' payment as required by Paragraph 5 of this Consent Decree. This covenant not to sue is conditioned upon: a) the satisfactory performance by Settling Defendants of all obligations under this Consent Decree; and b) the veracity of the information provided to the United States and the State by Settling Defendants relating to Settling Defendants' involvement with the Site and their financial condition. This covenant not to sue extends only to Settling Defendants and does not extend to any other person.

13. In consideration of the payment that will be made by Settling Defendants under Paragraph 8 of this Consent Decree, and except as specifically provided in Section X (Reservations of Rights by Plaintiffs), the State covenants not to sue or take administrative action

against Settling Defendants pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607, R.C. Chapters 3734, 3745, 3767, 6111, and the common law relating to the Site. With respect to present and future liability, this covenant not to sue shall take effect upon receipt of Settling Defendants' payment as required by Paragraph 8 of this Consent Decree. This covenant not to sue is conditioned upon: a) the satisfactory performance by Settling Defendants of all obligations under this Consent Decree; and b) the veracity of the information provided to the United States and the State by Settling Defendants relating to Settling Defendants' involvement with the Site and their financial condition. This covenant not to sue extends only to Settling Defendants and does not extend to any other person.

X. RESERVATIONS OF RIGHTS BY PLAINTIFFS

14. The United States and the State reserve, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all matters not expressly included within the Covenant Not to Sue by Plaintiffs in Paragraphs 12 and 13. Notwithstanding any other provision of this Consent Decree, the United States and the State reserve all rights against Settling Defendants with respect to:

- a. liability for failure to meet a requirement of this Consent Decree;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments; or
- d. liability based upon the ownership or operation of the Site, or upon the transportation, treatment, storage, or disposal, or the arrangement for the transportation,

treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Decree by Settling Defendants.

15. Notwithstanding any other provision in this Consent Decree, the United States and the State reserve, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action or to issue an administrative order seeking to compel Settling Defendants to perform response actions relating to the Site, and/or to reimburse the United States and/or the State for additional costs of response, if information is discovered which indicates that any Settling Defendant has withheld, misstated, or misrepresented any information submitted to the United States relating to Settling Defendants' financial ability to perform Site response actions or reimburse Site response costs.

XI. COVENANT NOT TO SUE BY SETTLING DEFENDANTS

16. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States or the State or their respective contractors or employees with respect to the Site or this Consent Decree, including, but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the Constitution of the State of Ohio, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law;

c. any claim against the United States or the State pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site; and

d. any claims against the State pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, R.C. Chapters 3734, 3745, 3767, 6111, or the common law, relating to the Site.

Except as provided in Paragraph 16 (Waiver of Claims) and Paragraph 18 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States or the State brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 14 (c) or (d) or Paragraph 15, but only to the extent that Settling Defendants' claims arise from the same response action, response costs, or damages that the United States or the State is seeking pursuant to the applicable reservation.

17. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

18. Settling Defendants agree not to assert any claims or causes of action (including claims for contribution under CERCLA) that they may have for all matters relating to the Site against any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that Settling Defendants may have against any person if such person asserts or has asserted a claim or cause of action relating to the Site against Settling Defendants.

XII. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

19. Except as provided in Paragraph 18 (Waiver of Claims), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Except as provided in Paragraph 18 (Waiver of Claims), the United States, the State, and each Settling Defendant all reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

20. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant action; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue included in Paragraph 12.

21. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendants are entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), for “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States, the State, or any other person.

XIII. RETENTION OF JURISDICTION

22. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XIV. INTEGRATION/APPENDICES

23. This Consent Decree and its appendices constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree. The following appendices are attached and incorporated into this Consent Decree:

“Appendix A” is the map of the Site.

“Appendix B” is the list of financial documents pertaining to Settling Defendants that were submitted to the United States by Settling Defendants.

XV. LODGING AND THE OPPORTUNITY FOR PUBLIC COMMENT

24. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment. The United States shall file with the Court any written comments received and the United States’ response thereto. The United States and the State each reserves the right to withdraw or withhold its consent if comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper or inadequate. Settling Defendants consent to entry of this Consent Decree without further notice, and the United States and the State each reserves the right to oppose an attempt by any person to intervene in this civil action.

XVI. EFFECTIVE DATE

25. The effective date of this Consent Decree shall be the date of entry by this Court, following public comment pursuant to Paragraph 24.

XVII. SIGNATORIES/SERVICE

26. Each undersigned Settling Defendant or representative of a Settling Defendant, the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice or his delegatee, and the Assistant Attorney General for the Environmental Enforcement Section of the Ohio Attorney General's Office, each certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such party to this document.

27. Settling Defendants agree not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.

28. Settling Defendants shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of Settling Defendants with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service including, but not limited to, service of a summons, in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court.

XVIII. FINAL JUDGMENT

29. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between and among the United States, the State, and the Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS ____ DAY OF _____, 2008.

Peter C. Economus
United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. Industrial Excess Landfill, Inc.*, 5:89CV1988 (N.D. Ohio), relating to the Industrial Excess Landfill Site in Uniontown, Ohio.

FOR THE UNITED STATES OF AMERICA

Date: 3/20/08

Ronald J. Tenpas
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

Date: 3/31/08

Catherine Banerjee Rojko
Senior Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
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Date: 3-13-08

Richard C. Karl
Director, Superfund Division
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Timothy J. Thurlow
Associate Regional Counsel
U.S. Environmental Protection Agency
Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. Industrial Excess Landfill, Inc.*, 5:89CV1988 (N.D. Ohio), relating to the Industrial Excess Landfill Site in Uniontown, Ohio.

FOR THE STATE OF OHIO

4/4/08
Date

Timothy J. Kern
Assistant Attorney General
Public Protection Division
Environmental Enforcement Section
State of Ohio
Office of the Attorney General
30 East Broad Street, 25th Floor
Columbus, Ohio 43215-3400

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of *United States v. Industrial Excess Landfill, Inc.*, 5:89CV1988 (N.D. Ohio), relating to the Industrial Excess Landfill Site in Uniontown, Ohio.

FOR DEFENDANTS CHARLES KITTINGER
AND KITTINGER TRUCKING CO.:

Date:

Jan 24 2008


Charles Kittinger

FOR DEFENDANT MERLE KITTINGER:

Date:

Jan 24-2008

Merle Kittinger " "

Agent Authorized to Accept Service on Behalf of Charles Kittinger, Merle Kittinger, and Kittinger Trucking Co.:

Name: Charles Kittinger

Title: *owner*

Address: *1529 TRIPLETT BLVD
AKRON OHIO 44306*

DURABLE POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that I, **MERLE B. KITTINGER**, now residing at **1529 TRIPLETT BOULEVARD, AKRON, OHIO 44306**, have made, constituted and appointed, and by these presents do make, constitute and appoint my ex husband, **CHARLES M. KITTINGER, 1529 TRIPLETT BOULEVARD, AKRON, OHIO 44306, (330) 733-0818**, my true and lawful attorney, for me and in my name, place and stead. If my agent ceases to act due to death, incapacity, or resignation, I appoint my daughter, **SUSAN B. TUCKEY, 2325 KAYWOOD LANE, WINSTON-SALEM, NORTH CAROLINA 27103, (336) 734-1643**, the successor agent. If my successor agent ceases to act due to death, incapacity, or resignation, I appoint my daughter, **MELISSA A. COX, 316 LONG LAKE ROAD, AKRON, OHIO 44312, (330) 644-1912**, the successor agent. A written resignation of the prior agent(s), a death certificate, a statement of incapacity, or an affidavit by a successor agent that a prior agent is unable, unwilling or unavailable to serve, shall be sufficient evidence that a successor agent may act.

1. To make, carry out and execute any and all contracts;
2. To sell, convey, barter, exchange, encumber, lease, or otherwise dispose of any property belonging to me, whether real, personal or mixed, or any part thereof or any interest therein, and to execute the necessary or required bills of sale, assignments, transfers, leases, notes, mortgages or conveyances, whether under seal or otherwise;
3. To carry on, conduct and conclude any and all negotiations in and about any business of mine or in which I may be interested within the State of Ohio or elsewhere;
4. To draw and sign checks or withdrawal orders upon any bank or savings association or other depository in which I now have or may hereafter have an account or accounts subject to withdrawal, and to endorse any and all bills of exchange payable to me;
5. To receive, endorse and collect checks payable to my order, drawn of the Treasurer of the United States, for whatever account, and to give full discharge for same;
6. To make, sign, execute and deliver promissory notes or bills of exchange, with or without warrant of attorney;
7. To sign or endorse any and all stock certificates issued by any corporation or similar organizations;
8. To enter any safe deposit box leased in my name and to remove any part or all of the contents thereof;
9. To trade, buy and sell securities without restriction at brokerage firms;

10. To vote at any general or special meeting of stockholders all stock owned, held or controlled by me or standing in my name;
11. To receive and receipt for dividends upon any stock belonging to me or standing in my name and on which I may be entitled to receive dividends;
12. To collect, receive and receipt for all interest money and all money or credits of any kind or nature belonging or owing to me on account whatsoever;
13. To make and change beneficiary designations, including revocable and irrevocable designations; to consent or to waive consent in connection with the designation of beneficiaries and the selection of joint and survivor annuities under any employee benefit plan;
14. To make, sign and execute in my name and on my behalf any and all tax returns, State or Federal, which I may be authorized or required to make between the years 1994 and 2044;
15. To compromise, settle or to sue and carry on any and all suits or legal proceedings of any kind in my name or for my benefit and, generally,
16. To make gifts of my real or personal property or my interest in such property to my ex husband, **CHARLES M. KITTINGER**, and/or my children, even if one of said individuals is acting as my attorney-in-fact. These gifts may be made for purposes of facilitating my eligibility for governmental benefits or assistance, to reduce overall estate or income taxes, or to reduce the effect of Medicaid estate recovery. Any such gifts shall be made upon the advice of an attorney with knowledge and experience regarding these matters. These gifts may be made in such manner as my attorney-in-fact deems appropriate, including outright gifts, gifts in trust, and gifts to custodians under a uniform transfers to minors act.
17. My Attorney-in-Fact may buy assets of mine or engage in any transaction he or she deems in good faith to be in my best interest, no matter what the interest or benefit to my Attorney-in-Fact.
18. Within thirty days after my agent begins to act under this agency document, my agent shall notify me and any successor agent named in this power. Also, my agent shall account for his or her agency by providing a statement of accounting showing all receipts, disbursements, and assets changes or investment transactions since the prior statement of account and inventory of my then-current assets known to the agent. The accounting shall be made at least once a year, and copies shall be sent to me and to any named successor agent. The statement of account shall be deemed to have been furnished to the person entitled thereto when it has been placed in the United States mail addressed to that person at the person's last known address even if that person is under legal disability. Copies of documents evidencing ownership of assets and a copy of my most recent personal tax return shall be attached to the accounting. Failure to provide the required notice or accounting shall be cause for removal as my agent even if the agent has not otherwise breached any fiduciary duty.

- IN WITNESS WHEREOF, I have hereunto set my hand this 23 day of Feb, 2006.

MERLE B. KITTINGER

CHARLES M. KITTINGER